

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 83 OF 2015

STATE

-v-

WILLIAM PETERS

Counsel

Mr S. Seruvatu for State

Ms K. Vulimainadave / T. Varinava for Accused

Dates of Trial : 02nd and 3rd October, 2018

Date of Summing Up : 3rd October, 2018

(Name of the victim is suppressed. She is referred to as SM)

SUMMING UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you

will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of facts. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for the Prosecution and the Accused made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.

8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this courtroom. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw inferences from proved facts if you find those inferences reasonable in the circumstances. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable. But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
13. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence

and with his or her previous statements or with other witnesses who have given evidence in court. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.

14. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told Court contradicts with his/her earlier version. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter.
15. When you evaluate evidence of witnesses, please bear in mind their intellectual capabilities, their personal circumstances, their level of education and maturity, and then try and look at things from their perspective. If it appears reasonable from their perspective, then you might think he or she is reliable and believable.
16. You can consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.
17. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. Victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. It takes a while for self- confidence to reassert itself. There is, in other words, no classic or typical response by victims of Rape. It is a matter for you to determine whether, in this

case, complaint victim made to her mother and police is genuine and what weight you attach to the complaint she eventually made.

18. I now wish to direct you on recent complaint evidence. You heard SM's mother Ana told us what she heard from her daughter on the 8th of May, 2015. However, Ana was not present when the alleged incident happened and therefore, she is not capable of giving evidence as to what actually happened between the victim and the accused. Therefore, what Ana heard from the victim is not evidence as to what actually happened between the victim and the accused. Recent complaint evidence is led to show consistency in the conduct of the victim and is relevant only in assessing her credibility. If you find that the complaint the victim made to her mother is a recent complaint in the circumstances of this case, and Ana to be a credible witness, than you may use her evidence to test the consistency and credibility of the victim.

19. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before court on the basis of their learning, skill and experience.

20. Doctor Vaniqi in this case, gave evidence as an expert witness. Doctor's evidence is not accepted blindly. You will have to decide the issue of rape before you by yourselves and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the trial. You have to bear in mind that the expert evidence does not implicate the accused or link him to the alleged offence even if you decide to rely on it. You can only use doctor's opinion to test the constancy of victim's story that she was raped.

21. You may consider whether there is a reason or motive on the part of the witnesses to make up an allegation against the accused. If the witnesses had such a motive, then you may think that this allegation has been fabricated.
22. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case.
23. The agreed facts of this case are:
 - I. The alleged accused in this matter is William Peters, 19 years old of Nasoso, Nadi at the time of the alleged offence.
 - II. The alleged complainant in this matter is SM, 4 years old of, Nadi at the time of the alleged offence.
 - III. The alleged complainant was born on the 14th of October, 2010.
 - IV. The alleged complainant's mother is Ana Waqatabu Bea.
 - V. The alleged accused is the step cousin of the alleged complainant.
24. I have given you a copy of the information which contains the charges against the accused. Please refer to it. The information reads as follows:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

WILLIAM PETERS on the 29th day of April, 2015, at Nadi in the Western Division, had carnal knowledge of **SM**, a child under the age of 13 years.

SECOND COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (c) (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

WILLIAM PETERS on the 29th day of April, 2015, at Nadi in the Western Division, penetrated the mouth of **SM** with his penis, a child under the age of 13 years.

25. I will now deal with the elements of the offence of Rape. A person rapes another person if:
- (a) The person has carnal knowledge with or of the other person without other person's consent; or
 - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
 - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
26. Consent as defined by Section 206 of the Crimes Act means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent. A person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The victim in this case was 4 years of age at the time of the alleged offence and therefore, she did not have the capacity under the law to consent. So, the Prosecution does not have to prove the absence of consent on the part of the victim because law says that she, in any event, cannot consent.

27. There are two different types of rape counts in this case. The elements of the 1st count of Rape are that:

- a. the accused, William Peters;
- b. penetrated the vagina of the victim SM, with his penis.

28. The elements of the 2nd count of Rape are that:

- a. the accused, William Peters;
- b. penetrated the mouth of the victim SM, with his penis.

Other parts of the offence are irrelevant to the facts of this case.

29. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.

30. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the victim was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

31. You saw victim give evidence hiding behind a screen so she could not see the accused. The screen was put up because the victim in this case is an underage vulnerable witness. By looking at this special arrangement, you must not draw any negative inference against the accused.

32. You will appreciate that children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. You have to be mindful about that.
33. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak. Bear in mind that they are being asked questions by an adult they see as being in a position of authority—the policeman in the interview, or a counsel in Court. That can make it difficult for them.
34. Please remember, there is no rule in Fiji for you to look for corroboration of victim's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
35. I will now remind you of the Prosecution and Defence cases. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case.

Case for the Prosecution

PW 1 Ana Waqatabu Bea

36. Ana is the mother of the victim. She said that her younger daughter SM was born on 14th of October, 2010.

37. On the 08th of May, 2015, when she was looking at herself in the mirror, her daughter SM was standing beside her, looking at herself in the mirror. She was playing with saliva from her mouth, putting saliva in and out of the mouth, repeatedly doing the same. She told SM to stop doing that as it's a bad manner to do that. At one point in time, she put the saliva out from her mouth, and told *"mum you remember the day you were washing clothes, Willy put his "palu" inside my mouth, inside my bum and also inside my "balei" meaning vagina"*.
38. She then sat down with SM and, giving her a pen, asked her to demonstrate as to how Willy did it. SM put the pen right inside her mouth. SM also said that Willy lifted her up and bent her over and inserted his "palu" inside her bum and also inserted it in her "balei". Then she asked SM why she didn't shout to ask for help, then SM said: she wanted to but Willy blocked her mouth.
39. SM further informed her that after Willy had closed her mouth and after he had done that act, she told Willy that she will inform mother of what Willy had done to her. Then Willy slapped her and informed her not to inform this to anybody.
40. Ana said that she remembered the day she was washing clothes. It came to her mind that it was on 29th April, 2015. The toilet where the incident happened was located outside about 10 meters away from where she was washing clothes.
41. William is the step son of her small sister who was residing with her in that same house. On the 29th of April, 2015, William was at home at that time. She informed her mother about what she heard from SM and reported the matter to the Police the next day on the 09th of May. A police officer took a statement and after that she took SM to the hospital and explained to the doctor what SM had informed her. The doctor medically examined SM.
42. She talked to William before she went to police. William denied the allegation.

43. Under Cross-examination, Ana admitted that there were roughly more than 10 people, mostly children, living in her house in 2015. Only William's father stayed with them but at times William visited and stayed with them and went back.
44. Ana admitted that there was an old bicycle in her house but said she did not see children riding the bicycle. She admitted that the matter was reported to police on the 9th of May, 2015, that was 8 or 9 days after the alleged incident.
45. Ana said that on 29th April 2015, when she was washing cloths around 6 pm, SM wanted to visit the rest room. She denied that SM was allergic to mango juice and the saliva kept coming out from SM's mouth because of the allergic reaction she had.
46. Ana denied fighting over food and utility bills with sisters in the house. She denied making up this story because she was unhappy when William and her sister stayed longer in her house.
47. Ana said that if anybody beat or touched, SM would come and inform her. The reason for the delay was because SM was scared of what Willy had told.
48. Ana admitted that in her statement to police she had not mentioned that Willie had slapped SM. She denied telling SM what to say to police on the 10th May 2015.

PW 2 SM (The Victim)

49. SM said that she came to Court to tell what Willy had done to her. Willy put his 'palu' in her mouth. She said that Willy carried her and put his "palu" on her bum and in her "balei". When asked to point to 'balei' SM pointed to her private part. After Willy had put his "palu" in her mouth, in her bum and in her "balei" he told her not to tell anybody. She was in the toilet at that time. Willy pushed the door and came inside the toilet. She did try to shout, but Willy blocked her

mouth. It happened in the night. Her mother was washing the clothes. She was wearing a yellow pants and the pink watermelon t-shirt.

50. Willy is the brother of her cousin. Sometimes, Willy used to come over to her house. She told her mum about what Willy did to her. When the clerk showed the diagram of a human body depicted in the medical report and asked her to point to where the "palu" is on that picture, she pointed to where the genital organ is located.
51. Under cross-examination, SM admitted that there was a very old bicycle in her house. But she denied riding the bicycle. She denied mango sap caused an itch and a rash in her mouth. She said that when the police officer was asking questions, it was she who was answering. She denied that she was telling a story that her mother had told her.

PW 3 Dr. Lice Sororua Vaniqi

52. Doctor examined SM on 09th of May, 2015 at 7.10 pm and prepared a medical report. Referring to the medical finding she had recorded at Section D (12) of the Medical Report, the doctor said that victim's hymen was not intact and the area around inner part of the vagina appeared red but not bruised.
53. Explaining her professional opinion the doctor said that in a 4 year old child, hymen usually is intact and it's unusual for area around the vagina to be red. She said that reddening could be from a penetration of the vagina when it is not lubricated well. The hymen is usually intact in a 4 year old and it's not supposed to be torn or broken. Doctor concluded that there was possible sexual penetration because the hymen was not intact and the area around the vagina was red which, an indication of a blunt force injury.
54. Under cross-examination the doctor said that it is not a must that all 4 year old females had to have a hymen. She said that the hymen can accidentally be torn from gymnastic or horse riding or use of tampons, and bicycle riding.

55. Doctor further said that apart from digital penetration or penile penetration, reddening in vaginal wall could be caused by vaginal infection. However she said that such infections are not common in 4 year olds. The doctor could not ascertain when the injury actually happened, but she could only say that it was recent. She is also not sure whether it was digital or penile penetration.
56. That is the case for the Prosecution. At the closure of the Prosecution case, you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
57. You know that the accused elected to exercise his right to remain silent. That is his right. You should not assume that he remained silent because he is guilty. He has nothing to prove and is under no obligation to prove his innocence. The counsel for Defence put her case to the prosecution witnesses in her cross examination. You must take into consideration the version of the defence when evaluating evidence.

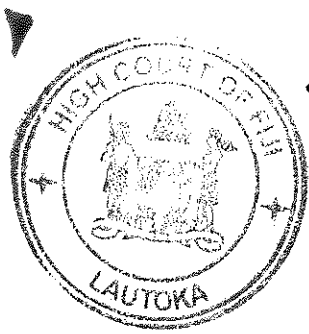
Analysis

58. Ladies and gentleman assessor, the accused is charged with two counts of Rape. First count concerned a penile rape while the second count is one of oral penetration. To find the accused guilty on the 1st count you must be satisfied that the prosecution had proved beyond a reasonable doubt that the accused penetrated victim's vagina with his penis. To find the accused guilty on the 2nd count you must be satisfied that the prosecution had proved beyond a reasonable doubt that the accused penetrated victim's mouth with his penis.
59. Prosecution called three witnesses, the victim SM, her mother Ana and doctor Vaniqi. Prosecution's case is substantially based on the evidence of the victim. The prosecution says that victim's evidence is credible and her evidence is further strengthened by the recent complaint evidence and the medical evidence of the doctor.

60. If you are satisfied that the evidence victim gave in court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration of her evidence is required.
61. Prosecution says that the victim is consistent in her conduct because she had informed her mother Ana about the incident. According to Ana the alleged incident had occurred on the 29th April 2015. SM had relayed the incident to her mother on the 8th of May 2015. There is a delay of approximately 9 days in reporting the alleged incident to her mother. The report was lodged on the 10th of May 2015 and Ana gave her statement on the following day. You decide if the victim had made a recent complaint and what weight should be attached to it.
62. SM said that her mouth was blocked when she wanted to shout and she was warned by Willy not to inform the incident to anybody. Ana explained reason why SM had delayed reporting the incident to her. She also explained the reason why she recorded the statement late with police. You decide if there was a reasonable explanation for the delay in reporting and what weight you should give to the evidence of the victim and her mother.
63. Prosecution says that the victim was 4 years old and there was no reason to make up this serious allegation against her step cousin. The Defence says that Ana made up this allegation because Ana wanted William out of her house after some disputes with his mother over food and utility bills. You decide if the victim or her mother had made up this allegation against the accused.
64. You had the opportunity to observe the demeanor of the victim and her mother. You decide if you could accept their evidence
65. The victim was medically examined by Dr. Vaniqi about 10 days after the incident. Prosecution says that the medical evidence is consistent with victim's evidence about the allegation of penile rape. Defence's argument is that the bicycle riding could have caused the injuries. You decide what weight you

should give to doctor's evidence and whether it boosted the credibility of prosecution's version of events. As I already said, doctor's evidence does not implicate the accused.

66. Defence case is one of denial. Defence Counsel says that the victim did not tell the truth in court. She wants you to disbelieve the witnesses called by the prosecution. She wants you to believe that victim's mother had made up this story and falsely implicated the accused because she wanted the accused out of her house.
67. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence, still the Prosecution should prove their case beyond reasonable doubt.
68. If you believe that the victim is telling you the truth when she said that Willy put his 'palu' in her mouth, and in her 'balei' and you are satisfied that the word 'palu' referred to the penis of the accused and the word 'belie' referred to victim's vagina you should find the accused guilty of Rape on both counts. Please bear in mind that there are two counts and you must consider the evidence on each count separately. But if you do not believe victim's evidence regarding the alleged offence, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty. Your possible opinion is either guilty or not guilty on each count.
69. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
70. Any re-directions?



Aruna Aluthge

Judge

AT LAUTOKA

3rd October, 2018

**Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Defence**